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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/056,712	01/28/2002	Max C. Perena	PERE100	2079

23590 7590 03/08/2005

RICHARD L HUFF
19304 OLNEY MILL ROAD
OLNEY, MD 20832

EXAMINER

LUBY, MATTHEW D

ART UNIT	PAPER NUMBER
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3611

DATE MAILED: 03/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Non-Responsive Submission

1. The timely submission under 37 CFR 1.129(a) filed on February 7, 2005 is not fully responsive to the prior Office action because it fails to address current art rejections by failing to point out why the prior art does not meet the claims. These rejections are proper under the MPEP because the BPAI suggested a course of action pursuant to MPEP 1214.06 (an affirmance in part). The Board affirmed the rejection of claim 2, which without even considering the other claims of record would be an Affirmance in Part (MPEP 1214.06, Part III). As to the other claims of record, here is a reproduction of part of MPEP 1214.04:

1214.04 Examiner Reversed

A complete reversal of the examiner's rejection brings the case up for immediate action by the examiner. If the reversal does not place an application in condition for immediate allowance (e.g., the Board has entered a new ground of rejection under 37 CFR 1.196(b)), the examiner should refer to the situations outlined in MPEP § 1214.06 for appropriate guidance.

The examiner should never regard such a reversal as a challenge to make a new search to uncover other and better references. This is particularly so where the application or *ex parte* reexamination proceeding has meanwhile been transferred or assigned to an examiner other than the one who rejected the claims leading to the appeal. The second examiner should give full faith and credit to the prior examiner's search.

If the examiner has specific knowledge of the existence of a particular reference or references which indicate nonpatentability of any of the appealed claims as to which the examiner was reversed, he or she should submit the matter to the Technology Center (TC) Director for authorization to reopen prosecution under 37 CFR 1.198 for the purpose of entering the new rejection. See MPEP § 1002.02(c) and MPEP § 1214.07. The TC Director's approval is placed on the action reopening prosecution.

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As clearly seen above, 1214.04 states "If the examiner has specific knowledge of the existence of a particular reference or references which indicate nonpatentability of any of the appealed claims as to which the examiner was reversed, he or she should submit the matter to the Technology Center (TC) Director...". This is exactly the situation in the present application. The examiner had knowledge of the existence of a particular reference since he had rejected claim 2 of record under it. The BPAI brought this to the examiner's attention again in their decision dated July 13, 2004. In the last Office action, the examiner followed up with this specific knowledge, which was then submitted, to the TC Director. The TC Director's approval is located at the bottom of the last Office Action.

While Applicant states that MPEP 1214.04 only applies to complete reversals, the same requirements listed under MPEP 1214.04 for re-opening prosecution applies to reversals-in-part by the BPAI. Otherwise, the only possible course of action would be (as Applicant seems to think with his suggested logic that 1214.06, Part II applying) issue claims that are reversed. This is clearly not the intent of the MPEP. Apparently, as the last reply by Applicant makes clear, Applicant is under the false assumption that MPEP 1214.06, Part II (Claims stand allowed) applies. Nowhere in the history of the prosecution has the Examiner ever indicated that claims are allowable. Neither has the Board. Therefore this section should not even be under consideration as the title is "Claims Stand Allowed".

2. Since the submission appears to be a *bona fide* attempt to provide a complete reply to the prior Office action, applicant is given a shortened statutory period of ONE MONTH or THIRTY DAYS from the mailing date of this letter, whichever is longer, to submit a complete reply. This shortened statutory period supersedes the time period set in the prior Office action. This time

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period may be extended pursuant to 37 CFR 1.136(a). If a notice of appeal and the fee set forth in 37 CFR 1.17(e) were filed prior to or with the payment of the fee set forth in 37 CFR 1.17(r), the payment of the fee set forth in 37 CFR 1.17(r) by applicant is construed as a request to dismiss the appeal and to continue prosecution under 37 CFR 1.129(a). The appeal stands dismissed.

3. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matt Luby whose telephone number is (703) 305-0441. The examiner can normally be reached on Monday-Friday, 9:30 a.m. to 6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lesley Morris can be reached on (703) 308-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Matt Luby
Examiner
Art Unit 3611



M.L.
March 2, 2005